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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 1018

CHANAN DON KHAN,
Petitioner,

vs.

BRUCE G. BARBER, District Director, United States Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

On March 11, 1958 the United States Court of Appeals for the Ninth Circuit made and entered its order affirming the judgment of the United States District Court for the Northern District of California, Northern Division, that petitioner be deported.

OPINIONS BELOW.

The opinions of the United States District Court (147 F. Sup. 771) and the United States Court of Appeals for the Ninth Circuit are set out in the appendix affixed hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 11, 1958 is now final for all purposes, no petition for rehearing having been filed. The statutory provision conferring jurisdiction upon this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit are as follows: 28 U.S.C. 1291; *Shaughnessy v. Pedreiro*, 349 U.S. 48.

QUESTIONS PRESENTED FOR REVIEW.

This appeal presents four primary questions. They are as follows:

(1) Whether or not an alien convicted prior to the passage of the Walter-McCarran Immigration Act is subject to deportation under Section 1251(a)(4) of the Act. In other words, does Section 1251(a)(4) of the Act, using the language "is convicted" have a retroactive effect?

(2) Whether the conviction of an alien at a trial of two counts of income tax evasion repre-

sents two crimes "not involving a single scheme of criminal misconduct".

(3) Whether income tax evasion is a crime involving moral turpitude within the meaning of the Immigration and Nationality Act.

(4) Whether Section 241(a)(4) of the Immigration and Nationality Act when taken with Section 145(b) Internal Revenue Code affords a sufficiently definite standard upon which to base a deportation.

FEDERAL QUESTION.

There can be no doubt that only federal questions are raised on this appeal, since it involves action by a federal agency and interpretations of federal statutes. (Title 8, U.S.C.A. 1251(a)(4); 5 U.S.C., Section 1009.)

GROUNDS FOR DECISION BELOW.

The Court below decided that Section 1251(a)(4) (Title 8, U.S.C.A. 1251(a)(4)) of the Nationality and Immigration Act must be given an interpretation which will give it retroactive effect. In other words, the ruling of the Court was that even though Congress used the language "is convicted" the statute nevertheless was meant to have retroactive effect and deportations were to be made against an alien who committed no offense after the passage of the Act and was not even convicted after the passage of the Act. We sub-

mit that this is a narrow and unnecessarily severe interpretation of the Act. It would also appear that this interpretation would make the statute void for vagueness under the rules heretofore mentioned. This would appear particularly true since the requirement of clarity in order to avoid being struck down for vagueness as applied to criminal statutes is that the statute must give notice in advance. We submit that if it is interpreted as the Court urges here, no notice in advance is given and the statute is therefore void for vagueness.

The Court below also reasoned that since the conviction of petitioner at one trial of tax evasion for two separate years did not necessarily involve a single scheme of criminal misconduct, it will be inferred that it did not. In other words, the essence of the decision in this regard seems to be that the burden is upon petitioner to prove, in order to escape deportation, that his crime involved a single scheme of criminal misconduct. It would appear to us that since the rules of criminal law will be applied to deportation due to the harsh nature of deportation, the burden should be upon the government to prove that the crime did not arise out of a single scheme of criminal misconduct. In other words, the burden of proving himself non-deportable should not be shifted to petitioner, but rather the government should show that he is a person subject to deportation.

The Court below, basing its decision upon an earlier case decided by it, made short shift of petitioner's claim that before a deportation will lie it must be shown that the crime charged necessarily involves

moral turpitude. We submit that our interpretation is the proper and logical one, and unless it can be said that all convictions under Section 145(b) necessarily involve moral turpitude no deportation should lie.

REASON FOR ALLOWANCE OF THE WRIT.

1. The Court below has decided an important national question on points not heretofore ruled upon by this Court, but which should be ruled upon by this Court.

So far as we can ascertain this Court has never squarely decided the question of the meaning of the phrase "not arising out of a single scheme of criminal misconduct," nor has this Court decided the question as to whether income tax evasion necessarily involves moral turpitude.

2. The decision of the Circuit Court below is in conflict with the decisions of the Court in the following cases; *U. S. v. Neely*, infra; *U. S. v. Corsi*, infra; *U. S. v. Day*, infra; *U. S. v. McCandless*, infra; *U. S. ex rel. McKenzie v. Savoretti*, 200 Fed. 546; and *U. S. v. Carrollo*, 30 Fed. Supp. 3.

This conflict in the lower Federal Courts could be resolved by a clear-cut decision of this Court.

3. The decision below, in part at least, seems to be in conflict with the decision of this Court in *U. S. v. Scharton*, infra.

FACTS OF THE CASE.

The essential facts are set out in the complaint affixed hereto as an appendix, and are not in dispute. Plaintiff is an alien, having entered this country from Afghanistan in 1923. On August 29, 1949 his status in this country was adjusted and he was granted a certificate of registry. On January 4, 1954 this certificate was rescinded because in 1952 Plaintiff had been convicted of income tax evasion in the years 1946 and 1947.

Nothing else was done in the matter until May 2, 1956 when Respondent served an order to show cause and notice of hearing upon Petitioner under the provisions of Section 214 of the Immigration and Nationality Act. On June 29, 1956 the hearing on the order to show cause was held at San Francisco, California before Monroe Kroll, Special Inquiry Officer of the United States Department of Justice, Immigration and Naturalization Service. Mr. Kroll ordered Plaintiff deported.

An appeal was taken from this order to the Board of Immigration Appeals, which body, on August 31, 1956 upheld the deportation order. This action for judicial relief followed. The District Court ruled in favor of deportation; the Circuit Court affirmed that judgment.

ARGUMENT.

A. PETITIONER IS NOT SUBJECT TO DEPORTATION UNDER THE TERMS AND PROVISIONS OF TITLE 8, U.S.C.A., SECTION 1251 (a)(4) (THE IMMIGRATION AND NATIONALITY ACT).

The pertinent section of the Act reads: "Any alien shall be deported who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct."

This Act was passed on June 27, 1952 and Plaintiff was tried and convicted in January of 1952. It is submitted that if it had been the intent of Congress to make Section 1251 (a)(4) of the Act to have retroactive in effect Congress would not have used the language "is convicted". "Is convicted" can only refer to events occurring after the passage of the Act. The argument in this connection is supported and strengthened by the fact that when Congress wanted Section 1251 (a)(3) of the Act to have retroactive effect it added the words "is hereafter convicted." This clearly means that it was the intent of Congress to deport certain aliens who were members of certain classes irrespective of a time of the commission of the act, but there was no intent to deport all who had already been convicted of certain crimes but did no wrong after the passage of the Act.

B. PLAINTIFF'S CONDUCT INVOLVED A SINGLE SCHEME OR PLAN.

It is conceded that the very language of Section 1251 (a)(4) of the Immigration and Nationality Act

makes it immaterial whether the two alleged crimes resulted in conviction at a single trial. The question is whether the two counts in the indictment were the result of a single scheme of criminal misconduct. The lawmakers must have anticipated the possibility of trials on a multiple count indictment, some involving a single scheme and others not. Unless we take this view, the exception in 1251 (a)(4) reading: "Not arising out of a single scheme of criminal misconduct" would be meaningless. In other words, Congress foresaw that some such indictments would involve a single scheme of criminal misconduct while others would not. It appears clear that income tax evasion for one year could be followed by tax evasion in a subsequent year all pursuant to a single scheme of criminal misconduct. This view is strengthened by the fact that evidence of tax evasion during one year is admissible to prove the evasion for the prior year.

In the case of *United States v. Sullivan*, 93 Fed. 2d 79, it was specifically held that evidence of tax evasion in one year is competent to prove tax evasion in a later year.

C. INCOME TAX EVASION DOES NOT NECESSARILY INVOLVE MORAL TURPITUDE WITHIN THE MEANING OF THE IMMIGRATION AND NATIONALITY ACT.

It has never been easy to determine what is a crime involving moral turpitude. The Senate Committee in drafting the Immigration and Nationality Act of 1952 faced the problem of deciding the meaning of the

term. It recognized that many classes of crimes involve moral turpitude while others do not. It referred specifically to the case of *U. S. ex rel. Mylius v. Uhl*, 203 Fed. 152 (1913) and by implication accepted the definition given therein. The definition there given was that the act must be one showing the perpetrator to have personal depravity and baseness. It was said that the crime must by necessity involve moral turpitude. In other words, all who commit the crime must be presumed to be vile, base and depraved.

The case in question involved criminal libel. In analyzing this specific crime the Court said that there are times when criminal libel might show such depravity as to involve moral turpitude, but went on to point out that editors have been held guilty even though they had no personal relationship with the published matter. Since some libels would involve moral turpitude and others would not it could not be said that the "crime in its very nature, necessarily involves moral turpitude".

See also: *U. S. v. Neely*, 208 Fed. 2d 337.

A taxpayer may be guilty of a violation of Section 145 (b) of the Internal Revenue Code without personally preparing the return, or in fact having anything to do with it except furnishing certain figures to his bookkeeper. The taxpayer need not be depraved, immoral or base in order to be convicted. He can simply be negligent, or worse still, too trusting in the belief that others will properly keep his records, make his return, and pay his tax. *Remmer v. U. S.*, 205 Fed. 2d 277.

The test seems to be that if acts of base or depravity are necessary for conviction, then the crime necessarily involves moral turpitude. It is the inherent nature of the offense which governs. *U. S. ex rel. McKenzie v. Savoretti*, 200 Fed. 546; *U. S. v. Carrollo*, 30 Fed. Supp. involved an attempt to evade a federal tax. There the Court said:

> "We are not prepared to rule that an attempt to evade payment of a tax due the nation or the commonwealth, wrong as it is, and as unlawful as it is, is an act evidencing baseness, vileness or depravity."

The Court went on to say that the answer must be found in the essential nature of the crime, and not in the skill of prosecutors in drafting pleadings.

It is quite possible that some income tax evasion cases, because of surrounding facts and circumstances, may involve moral turpitude. Before, however, a deportation under Section 1251 (a)(4), Immigration and Nationality Act may result from conviction of a crime involving moral turpitude, the crime by its very nature must involve moral turpitude and everyone convicted of that crime must be guilty of moral turpitude. This was the holding in *United States v. Neely*, supra: *United States v. Corsi*, 63 Fed. 2d 757; *United States v. Day*, 51 Fed. 2d 1022; *United States v. McCandless*, 28 Fed. 2d 287.

Since the crimes of which Petitioner was convicted involved violation of Section 145 (b) U.S. Internal Revenue Code, it becomes pertinent to explore further the question as to whether a violation of that law

always involves moral turpitude. We contend that it is the conclusively settled law of the land that a violation of Section 145 (b) United States Internal Revenue Code does not necessarily involve a moral turpitude. *United States v. Scharton*, 285 U.S. 518. Scharton was indicted under Section 1114 (b) of the 1926 Internal Revenue Code, but the District Court quashed the indictment on the ground that fraud was not an essential element of the crime, and for that reason the longer statute of limitations provided in the fraud section of the statute did not apply. There, as here, the Government contended that fraud is implicit in the concept of evading or defeating a tax. This Court rejected that contention and held that the six-year statute of limitation applied only in cases "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." The judgment quashing the indictment was affirmed. Neither the District Court nor the Circuit Court of Appeals has offered anything to distinguish the *Scharton* case from the one at bar.

D. SECTION 241 (a)(4) OF THE IMMIGRATION AND NATIONALITY ACT WHEN TAKEN WITH SECTION 145 (b) INTERNAL REVENUE CODE DOES NOT AFFORD A SUFFICIENTLY DEFINITE STANDARD UPON WHICH TO BASE A DEPORTATION.

Deportation is such a harsh and drastic penalty that it will be treated as a forfeiture or penalty, and the rule applicable to testing criminal statutes for vagueness will be applied. *Fong Haw Tan v. Phelan*,

333 U.S. 6, 92 L. ed. 433. The test is whether the statute conveys sufficiently definite warning to the actor as to the probable consequences of his act. *Connally v. General Construction Company*, 269 U.S. 385. The very word "warning" denotes notice in advance. How could appellant in this case have known in advance that he would be charged and deported for income tax evasion if the law under which he is deported was not even enacted when he committed the crime, nor when he was convicted thereof?

CONCLUSION.

We are not waving the flag or pleading for sympathy when we respectfully repeat the truism that ours is a nation made up of immigrants and their offsprings. Our country was founded and largely made great by the infusion into the main stream of our national life a steady flow of men and women from the four corners of the earth. Ours is a fertile, prosperous and great land—in fact the greatest—it is truly "The land The Lord remembers".

But what has this to do with Chanan Din Khan? It has much to do with him. This Court is called upon to interpret a section of our immigration laws and a section of our tax laws as it relates thereto. In making these interpretations the Court should consider the fact that for nearly two-hundred years ours has been the "open door", and we have entreated the world to send us its teeming millions. We should not now so technically and restrictively interpret our

laws so as to fashion reasons and apparent justification for closing our open door, or for sending back those who, though they have spent their useful and productive years with us, have erred in a fashion rather common to the native-born. For the alien we say the usual penalties of fine and imprisonment are not cruel enough; we must now banish him. This is hardly in keeping with the American ideal of fair play for all, regardless of nationality or place of birth. The judgment below should be reversed.

Dated, Sacramento, California,
April 30, 1958.

Respectfully submitted,
/s/ NATHANIEL S. COLLEY,
Attorney for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

[Title of District Court and Cause.] (157 Fed. Supp. 771.)

MEMORANDUM AND ORDER

By this action plaintiff, a resident alien, seeks a judicial declaration that a deportation order issued by defendant in June, 1956, is invalid. All administrative remedies having been exhausted, jurisdiction in this Court obtains under the provisions of § 10 of the Administrative Procedure Act (5 U.S.C.A., § 1009).

The deportation order was based on the provisions of Title 8, U.S.C.A., § 1251(a)(4),[1] plaintiff having been convicted in 1952 on two counts of income tax evasion under § 145(b) of the Internal Revenue Code of 1939.[2]

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[1]Title 8, U.S.C.A., § 1251(a)(4) provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(4) Is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

[2]Title 26, U.S.C.A., § 145(b) (1939 Code), provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The order of deportation can be sustained only if it is determined that:

(1) The crime of wilfully attempting to evade income tax liability under §145(b), supra, is a crime involving "moral turpitude," and

(2) Conviction at a single trial on two separate counts of income tax evasion under § 145(b), supra, was in fact a conviction of two crimes "not arising out of a single scheme of criminal misconduct."

Before discussing the question of "moral turpitude," the Court feels obliged first to examine the two offenses of which plaintiff was convicted (i.e., wilfully attempting to evade the payment of income tax for each of the years 1946 and 1947), and determine whether such offenses arose out of a "single scheme of criminal misconduct."

No authorities having been cited by the parties, and none having been found, to assist in interpreting the language in § 1251(a)(4), supra, the question appears to be one of first impression. In 1952 Congress wrought a change in the definition of a deportable convicted alien. Prior to the 1952 Act, under the applicable provisions of former § 155(a) (Title 8, U.S.C.A.), in order to be deportable for crimes involving moral turpitude committed at any time after entry, the alien must have been twice sentenced to a term of imprisonment in excess of one year. This section, as it thus read, was interpreted to mean that the alien must have been convicted and sentenced on two separate occasions, and not in one trial (Fong Haw Tan v. Phelan, 333 U.S. 6; see also Jordan v.

DeGeorge, 341 U.S. 223). However, in 1952, for reasons not made clear in the bill itself, or even in the Committee reports,[3] Congress modified the language of this section to such an extent that an alien becomes deportable if he is merely twice convicted of crimes involving moral turpitude, whether the two convictions are in one trial or separate trials, and whether the alien is sentenced to a term of imprisonment as a result of such convictions. The language of the modification with which, as has already been noted, we are here concerned is the proviso that the two convictions cannot be for crimes "arising out of a single scheme of criminal misconduct."

Plaintiff contends that two violations of § 145(b) of the Internal Revenue Code of 1939, committed in consecutive years, manifests but a "single scheme"; the single scheme being, "to evade and defeat the federal income tax." While it is true that many separate offenses may be committed by an individual in the furtherance of some subjective predelict ion amounting to a general scheme of criminality, to hold that a mere lurking propensity to commit certain kinds of offenses manifests a "single scheme" within the meaning of §1251(a)(4), would be, in effect, to render nugatory a declared public policy to deport aliens who are convicted of two crimes involving moral turpitude. A more reasonable and rational interpretation of this language is that Congress contemplated

[3]Senate Report No. 1137, Jan. 29, 1952 (S. 2550); House Report No. 1365, Feb. 14, 1952 (H.R. 5678), and Conference Report No. 2096, June 9, 1952 (H.R. 5678).

nothing more than those situations where an alien's conviction is based on a multiple count indictment charging him with separate crimes, which were committed by the doing of a single act or a series of simultaneous or closely related and closely connected acts.[4]

The law is well established that a wilful attempt to evade the federal income tax under § 145(b) is a separate crime for each year such an attempt is made, and the offense is not a continuing one (Norwitt v. United States, 195 F. 2d 127, cert. denied 344 U.S. 817). Plaintiff, in the case at bar, was convicted of wilfully attempting to evade the payment of income tax for the year 1946, and for committing the same offense twelve months later in connection with income tax due for 1947. Plaintiff's hidden desire to defraud the government of its taxes does not render the two separate acts, which he committed in furtherance of that desire, part of a "single scheme" within the reasonable and rational meaning of the phrase in § 1251(a)(4), being here considered. The Court is of the view that these two offenses more

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[4]E.g.: Title 18, U.S.C.A., § 371 (conspiracy and the doing of an overt act); and see also 18, U.S.C.A., § 487 (counterfeiting, making and possessing dies); § 500 (forging and uttering a postal money order); § 641 (theft and possession of government property); and § 659 (theft and possession from an interstate shipment).

Although the Court is not bound by the statutory interpretations of the Board of Immigration Appeals, that body has placed a similar interpretation on this language. See: B. I. A., In the Matter of D——, Interim Decision No. 583, April 7, 1954; and Auerbach, Immigration Laws of the United States (1955), at page 132, et seq.

logically imply that plaintiff, in March of 1948 (when the 1947 tax was due), decided that his apparent success twelve months earlier warranted repetition. Two such separate and unrelated acts do not amount to a "single scheme of criminal misconduct." To reach a contrary conclusion would require the Court to assume that in 1947 (when the 1946 taxes were payable), defendant had then a fixed intention to commit another violation in 1948 as a part of a single scheme, and this frankly taxes the Court's credulity beyond the pale of reason.

Numerous attempts have been made to define what crimes involve "moral turpitude" for the purposes of determining whether an alien falls within the deportable classification set forth in § 1251(a)(4) of the 1952 Act, and § 155(a) of the prior act. Unquestionably the most helpful definition yet offered was given in the case of Jordan v. DeGeorge, supra, wherein it was stated (p. 232):

> "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. * * * Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."

The final question to be resolved is whether a violation of § 145(b) of the Internal Revenue Code of 1939 is a crime involving moral turpitude, as that phrase has been defined above by the Supreme Court.

Section 145(b) speaks in terms of "wilfulness," which has been defined by the Courts as meaning "bad faith," "bad purpose," "evil motive" and "tax evasion motive" (United States v. Murdock, 290 U.S. 389, Spies v. United States, 317 U.S. 492; Wardlaw v. United States, 203 F. 2d 884). With these definitions in mind, the Courts have, with apparent unanimity, held that in order for a conviction under § 145(b) to stand, the Government is required to prove that the evading taxpayer had a specific intent to evade taxation, amounting to an intent to defraud the United States.[5] Fraud is so inextricably woven into the term, "wilfully" as it is employed in § 145 (b), that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached.

Similar tax offenses have been held to involve "moral turpitude" (Jordan v. DeGeorge, supra; United States, ex rel., Berlandi v. Reimer, 113 F.

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[5]United States v. Rosenblum, 176 F. 2d 321, cert. denied 338 U.S. 893; United States v. Raub, 177 F. 2d 312; Norwitt v. United States, supra [main text]; Wardlaw v. United States, 203 F. 2d 884; Bloch v. United States, 221 F. 2d 786; Legates v. United States, 222 F. 2d 678; and United States v. Clark, 123 F. Supp. 608. Cf. Berra v. United States, 351 U.S. 131, at p. 134.

Plaintiff contends that the case of United States v. Scharton, 285 U.S. 518, is determinative of the issue of whether fraud is an element in § 145(b). A close examination of that case, however, discloses that the Supreme Court decided only that in order for the government to avail itself of the 6 year statute of limitations for fraud actions, the statute under which it was prosecuting must be specifically couched in terms of fraud. Moreover, the recent case of Berra v. United States, supra, sheds considerable doubt on plaintiff's interpretation of the Scharton case.

2d 429; and Maita v. Haff, 116 F. 2d 337),[6] and the Court is of the opinion that the crime set forth in § 145(b) squarely falls within the definition of moral turpitude laid down by the Supreme Court in Jordan v. DeGeorge, supra. If proof tantamount to a showing of a specific intent to defraud is required to convict a man under § 145(b), then it cannot be said with any degree of consistency and logic that the crime involves no fraud for the purposes of deportation.

It Is, Therefore, Ordered that plaintiff take nothing by his complaint on file in this action and that no order of restraint be issued against defendant in this case.

It Is Further Ordered that plaintiff's prayer that the order of deportation issued by defendant against plaintiff be declared null and void be, and it is, hereby denied.

And It Is Further Ordered that the defendant prepare findings of fact and conclusions of law, a form of judgment, and any other required documents, and lodge them with the Clerk of this Court pursuant to the applicable laws and the rules of this Court.

Dated, January 31, 1957.

/s/ Sherrill Halbert,
United States District Judge.

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[6]The Court does not find the case of United States v. Carrollo, 30 F. Supp. 3, persuasive on this point in view of the conclusion reached by the Supreme Court in Jordan v. DeGeorge, supra. The question of fraud as an element of moral turpitude was not reached in the Carrollo case, and the holding that income tax evasion did not involve moral turpitude was no more than a dictum.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Chanan Din Khan, Appellant, vs. Bruce G. Barber, District Director United States Immigration and Naturalization Service, Appellee.	No. 15,584 Mar. 11, 1958

Appeal from the United States District Court for the Northern District of California, Northern Division.

Before: Lemmon, Barnes and Hamley, Circuit Judges.

Barnes, Circuit Judge:

This is an action brought by appellant, a citizen of Afghanistan, to review an order of the District Director of the United States Immigration and Naturalization Service deporting him; to declare the same void; and to enjoin the deportation. (5 U.S.C. §1009; 66 Stat. 208.) The District Court had original jurisdiction to review (*Shaughnessy v. Pedreiro*, 349 U.S. 48), and appeal lies here. 28 U.S.C. §1291.

Appellant entered this country unlawfully on April 25th, 1923. On August 28th or 29th, 1949,[1] his status was adjusted and he was granted a Certificate of Registry.

On January 25th, 1952 a jury convicted appellant of both counts of a two count indictment charging him with violation of §145(b) of the Internal Revenue Code of 1939 (26 U.S.C. §145(b)),[2] which charged him with wilfully attempting to defeat and evade his income tax for the years 1946 and 1947 by filing two separate "false and fraudulent income tax returns."

Thereafter appellant's Certificate of Registry adjusting his status was rescinded, and in subsequent proceedings he was found deportable as having been convicted of two crimes involving moral turpitude (8 U.S.C. §1251(a)(4)).[3] The District Court affirmed the order of deportation.

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[1]Appellant's "Facts" state the date to be August 29, 1949; appellee's, August 28, 1949.

[2]Title 26, U.S.C. §145(b) 1939 Code, provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[3]Title 8, U.S.C. §1251(a)(4) provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(4) Is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after

The issue is simple. Was appellant, "after entry, ... convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct?"

Two questions must be answered.

Does conviction of 26 U.S.C. §145(b) involve moral turpitude? If so, does the evidence disclose that the two convictions arise from a single scheme?

This Court has already answered the first question affirmatively where, as here, intent to defraud the government is charged in the indictment and found by the jury.

> "We follow the rule laid down in the De George case (Jordan v. De George, 341 U.S. 223 (1951) and Bloch v. United States, 9 Cir., 221 F.2d 786, 788 (1955)) that an intent to defraud the government is a prerequisite to conviction under Sec. 145(b), and hence a conviction thereof where such fraud is charged in the indictment, is conviction of a crime involving moral turpitude." *Tseung Chu v. Cornell, etc.*, 247 F.2d 929, cert. den. December 9, 1957, ... U.S. .....

This has long been the rule. *Reyes v. Neely*, 5 Cir., 228 F.2d 609 (1956); *Maita v. Hoff*, 9 Cir., 116 F.2d 337 (1940); *Ponzi v. Ward*, 7 F.Supp. 736 (1934).

The second question is slightly more difficult. Appellant points to no facts in the record supporting

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entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

his assumption that the two years of evasion *could* have been the result of a single plan or scheme. In fact, he assumes they were "for purposes of argument only." Fraudulent returns in two different years could, or could not, be one plan or scheme. But we have no facts to prove such a scheme. We have here two different returns involving transactions a year apart. The evidence required on each count was necessarily different, and referred to acts occurring a year apart. This alone, is persuasive that two unrelated crimes were charged. In the absence of all evidence to the contrary, complete crimes committed on differing dates or in differing places are considered separate and different crimes, and support separate charges. Could the defendant in this case urge that there was but one substantive offense charged against him, and hence that the government was required to choose for which year it desired to prosecute defendant? Obviously not.

The mere assumption that evidence of a crime alleged in the first count might be admissible in a prosecution under the second count does not necessarily prove that if two somewhat similar crimes are committed a year apart, they are part of a common scheme.

To reduce appellant's position to an absurdity, he must urge that once an alien is convicted of fraudulently evading an income tax for one year, any subsequent attempt to evade income tax and convictions thereof *must* be presumed part of a single scheme or plan dating back to the original charge. If this were

so, the alien could never be deported, even though the convictions were twenty years apart. We cannot conceive this to be the meaning of the statute.

We fully understand that deportation is a drastic measure, a forfeiture of residence, and a penalty. For that reason, the statutory provision should be generously construed. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). But this does not require us to adopt a ridiculous interpretation favoring the alien at all events.

Appellant's proposed "common sense" test is whether evidence of the crime alleged in the first count of the indictment would be admissible in a prosecution under the second count, and "since the theory of admissibility would be whether there was a plan or scheme, if such evidence could be admitted this would show that there was in fact only a single scheme."

Appellant's premise is false. There are theories of admissibility of a previous similar act other than to show a plan or scheme. For example, previous similar acts may be introduced to establish constituent elements of the crime charged, such as intent or motive, and may have no direct or apparent connection. *Fall v. U.S.*, (D.C.) 49 F.2d 566; *Witters v. U.S.*, 106 F.2d 837; *Weiss v. U.S.*, 5 Cir., 122 F.2d 675, 680, 682. Or, they may show malice. *People v. Chaves*, 122 Cal. 134. Or, it may be to show guilty knowledge, *Johnson v. U.S.*, 9 Cir., 22 F.2d 1, and this rule is applicable in tax cases. *Tonkoff v. U.S.*, 7 Cir., 86 F.2d 868, 879.

Finally, appellant urged at oral argument a matter not raised below nor in his brief, namely: that appel-

lant was convicted of income tax evasion in January 1952, and that the Walters-McCarran Immigration Act was passed June 27th, 1952; that the Act cannot be used against him.

8 U.S.C. §1251(a) reads in pertinent part:

> "Any alien . . . shall . . . be deported who . . . (4) . . . at any time after entry *is convicted* of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . ." [Emphasis added.]

Appellant urges "is convicted" can only refer to events occurring after passage of the Act, particularly because §1251(a)(3) uses the phrase "hereafter" and §1251(a)(6) uses the phrase "is, or at any time has been, after entry, a member of any" of certain classes of aliens. The very inclusion in §1251(a)(4) of the words "at any time after entry" makes the Act applicable to any conviction occurring after entry. These same words were in the previous 1940 Act,[1] and Congress, examining each section with great care, chose to use the same words, making the penalty applicable to any alien being twice convicted of certain crimes *committed at any time after entry.*

This Court reaffirms the Finding of the District Court that the appellant was given a fair hearing and that the decision of deportability is based upon reasonable, substantial and probative evidence.

The Judgment is *Affirmed.*

(Endorsed:) Opinion. Filed Mar. 11, 1958.
Paul P. O'Brien, Clerk.

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[1] 8 U.S.C.A. §155(a) (1942 ed.).

Appendix C

United States Court of Appeals
for the Ninth Circuit

Chanan Din Khan, Appellant, vs. Bruce G. Barber, etc.	No. 15,584

JUDGMENT

APPEAL from the United States District Court for the Northern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 11, 1958.

Paul P. O'Brien, Clerk.